



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/149833

PRELIMINARY RECITALS

Pursuant to a petition filed June 07, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on July 18, 2013, at Waukesha, Wisconsin.

The issue for determination is whether the agency properly established a divestment penalty period of 82 days from March 1, 2013 – May 21, 2013 based on a divestment of \$17,750 paid to the Petitioner's son for providing care and services.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Karen Pearson

Waukesha County Health and Human Services
500 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waukesha County.

2. On March 18, 2013, an application for MA was received for the Petitioner and his wife BR. The application reported that on May 17, 2012, the Petitioner and BR gave their son MaR \$25,000 in return for "home care from son for 2 years" and \$4,000 for "continued home care from son." On September 12, 2011, they gave MaR \$2,600 as a gift. It was also reported that the Petitioner and BR gave \$1,500 to their daughter on July 26, 2012. Further it was reported that Petitioner and BR gave \$2,400 as a gift to their grandson on August 8, 2011. Total transfer of assets reported was \$35,500.
3. In 2011, the Petitioner received SS benefits of \$1,272/month and a pension payment of \$270.75/month. BR received SS benefits of \$653.50/month and a pension payment of \$157.54. In 2012, the Petitioner's SS benefits increased to \$1,317.90/month and BR's SS benefits increased to \$676.90/month. The Community Spouse Asset (CSA) share calculation is \$11,354.
4. MaR moved to Wisconsin from Texas on or about April 1, 2011 to live with and care for his parents. He provided in-home care to his parents until February, 2013. There was no written contract governing the transfer of assets or payments to MaR or to the Petitioner's daughter or grandson.
5. On April 30, 2013, the agency closed the Petitioner's case for lack of requested verification. That same day, the Petitioner submitted the information requested. The case was re-opened. On May 17, 2013, the agency issued a Negative Notice to the Petitioner informing her that she was denied MA due to a divestment with a divestment penalty period of March 18, 2013 – June 8, 2013.
6. On June 7, 2013, an appeal was filed on behalf of the Petitioner with the Division of Hearings and Appeals.
7. On July 9, 2013, the agency issued a revised Negative Notice to the Petitioner informing him that his application for MA was denied due to a divestment of \$17,750 with a divestment penalty period of March 1, 2013 – May 21, 2013. The agency divided the \$35,500 divestment between the Petitioner and BR.

DISCUSSION

A person cannot receive institutional medical assistance if her assets exceed \$2,000. See Wis. Stat. §§ 49.46(1) and 49.47(4). Generally, a person cannot reach this limit by divesting assets, which occurs if she or someone acting on her behalf "disposes of resources at less than fair market value" within five years of the later of when they were institutionalized or applied for medical assistance. Wis. Adm. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f). If the person improperly divests her assets, she is ineligible for institutional medical assistance for the number of months obtained by dividing the amount given away by the statewide average monthly cost to a private pay patient in a nursing home at the time he applied. Wis. Adm. Code, § DHS 103.065(5)(b). Beginning on January 1, 2009, county agencies were instructed to use the average daily cost of care and determine ineligibility to the day rather than to the month. The daily amount is currently \$215.48 Medicaid Eligibility Handbook (MEH), § 17.5.2.2. A divestment does not bar eligibility under the following circumstances found in Wis. Adm. Code, § 103.065(4)(d)2:

- a. The individual intended to dispose of the resource either at fair market value or for other valuable consideration;
- b. The resource was transferred exclusively for some purpose other than to become eligible for MA;
- c. The ownership of the divested property was returned to the individual who originally disposed of it; or
- d. The denial or termination of eligibility would work an undue hardship. In this subparagraph, "undue hardship" means that a serious impairment to the institutionalized individual's immediate health status exists.

The Medicaid Eligibility Handbook (MEH) specifically discusses “divesting by paying relatives”:

It is divestment when an institutionalized person transfers resources to a relative in payment for care or services the relative provided to him/her.

It is not divestment if all of the following conditions exist:

1. The services directly benefited the institutionalized person.
2. The payment did not exceed reasonable compensation for the services provided. “Reasonable compensation” is the prevailing local market rate for the service at the time the service is provided.
3. If the amount of total payment exceeds 10% of the community spouse asset share, the institutionalized person must have a written notarized agreement with the relative. The agreement must:
 - a. Specify the service and the amount to be paid, and
 - b. Exist at the time the service is provided.

If there is no community spouse, use 10% of the highest possible CSAS.

MEH, § 17.8.

The facts of this case are not in dispute. The Petitioner received personal care services from his son MaR from April, 2011 – February, 2013 – i.e., services that “directly benefited the institutionalized person.” The payment to MaR for these services “did not exceed reasonable compensation for the services provided.” However, because the \$35,500 total payment exceeded 10% of the Medicaid community spouse asset share (\$11,354), the agency followed the policy directive that the payment be considered a divestment due to the lack of a written, notarized, contemporaneous service agreement between the Petitioner and MaR.

MaR acknowledges that a contemporaneous written service agreement does not exist. Unfortunately for the Petitioner, I have no discretion in this matter, because the MEH is completely in conformance with the following MA divestment statute:

(5) Care or personal services. For the purposes of sub. (2), whenever a covered individual or his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, transfers assets to a relative as payment for care or personal services that the relative provides to the covered individual, the covered individual or his or her spouse transfers assets for less than fair market value unless the care or services directly benefit the covered individual, the amount of the payment does not exceed reasonable compensation for the care or services that the relative performs and, if the amount of the payment exceeds 10% of the community spouse resource allowance limit specified in s. 49.455 (6) (b) 1., the agreement to pay the relative is specified in a notarized written agreement that exists at the time that the relative performs the care or services.
(emphasis added)

Wis. Stat. §49.453(5).

Based on the statutory language, the agency’s action in determining the payments made to MaR are a divestment is correct. There was no testimony regarding the reason for the transfer of cash to the Petitioner’s daughter or grandson. Therefore, I must conclude that these transfers totaling \$3,900 are also properly considered a divestment.

CONCLUSIONS OF LAW

The agency properly established a divestment penalty period of 82 days from March 1, 2013 – May 21, 2013 based on a divestment of \$17,750 paid to the Petitioner's son for providing care and services and to the Petitioner's daughter and grandson.

THEREFORE, it is

ORDERED

That the petition is hereby dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

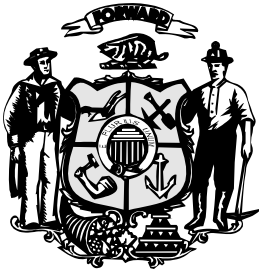
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 12th day of August, 2013

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Wayne J. Wiedenhoeft, Acting Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on August 12, 2013.

Waukesha County Health and Human Services
Division of Health Care Access and Accountability